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Supreme Court, U.S.
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No. 97-453

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELKO COUNTY GRAND JURY, PETITIONER

v.

BEN SIMINOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that neither a Nevada state court nor a federal district court on removal pursuant to 28 U.S.C. 1442(a)(1) had jurisdiction to compel a federal officer to testify before a county grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 109 F.3d 554. The order of the district court (Pet. App. B1-B2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1997. The petition for a writ of certiorari was filed on June 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under Nevada law, private citizens may petition a state district court to convene a grand jury. The state court must convene a grand jury if the petition submitted "contain[s] the signatures of reg-

istered voters equal in number to 25 percent of the number of voters voting within the county at the last preceding general election." Nev. Rev. Stat. Ann. § 6.130(1) (Michie 1986).

In 1995, residents of Elko County, Nevada, circulated a petition requesting an investigation into "violation[s] of the rights of the citizens of Elko County by Government agencies." Pet. App. C1. The petition called for a grand jury to investigate alleged "collusion between employees and officials of the United States Forest Service, preservationist groups, and possibly State officials, * * * the effects of which are to severely limit, obstruct, or terminate all economic and recreational activity on public lands in Elko County." *Id.* at C3.

In February 1996, a Nevada state court empaneled the Elko County Grand Jury. In its instructions to the grand jury, the court declared that the grand jury's mission was "the investigation, and the possible criminal prosecution, concerning the administration of public lands." Pet. App. C4.

b. On March 4, 1996, the grand jury issued a subpoena for the testimony of Ben Siminoe, an employee of the United States Forest Service, an agency within the United States Department of Agriculture (USDA). Pet. App. C1 n.1. By letter dated March 5, 1996, the Elko County District Attorney confirmed that Siminoe would be asked to testify "about Forest Service organization and land management policies in Elko County," and that he would be "essentially a background witness who can acquaint the Grand Jury with the rudiments of what the forest service does in managing the forest, and who does it, and how they do it." *Id.* at C5.

On March 6, 1996, in response to an emergency motion filed by the United States, the state court quashed the subpoena and stayed similar process issued to federal officials to allow further consideration. Pet. App. C1 n.1. Notwithstanding that order, the Elko County District Attorney informally reiterated his request that Siminoe testify. *Ibid.*

By letter dated April 10, 1996, Siminoe's superior directed him not to appear before the grand jury. Pet. App. C. The directive was issued pursuant to Department of Agriculture regulations, sometimes referred to as "*Touhy* regulations,"[1] that govern testimony by federal employees. See 7 C.F.R. 1.210-1.214. The USDA *Touhy* regulations prohibit agency employees from appearing to give testimony "when such appearance is in their official capacity or arises out of or is related to their employment with USDA," unless the agency specifically authorizes the testimony. 7 C.F.R. 1.210, 1.214(b).

On May 3, 1996, the state court lifted its stay of the grand jury's issuance of process to federal employees, agents and officials. The state court ruled that the grand jury could subpoena a federal official and, upon the refusal of the federal official to honor the subpoena, could petition the state court for a bench warrant. Pet. App. A4.

2. After the subpoena reissued, Siminoe, represented by the Department of Justice, removed the pro-

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[1] The term "*Touhy* regulations" refers to regulations promulgated by an agency under 5 U.S.C. 301 to govern agency employee conduct in responding to requests or demands made upon them for information. The name derives from this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), which involved such regulations.

ceeding to the United States District Court for the District of Nevada pursuant to 28 U.S.C. 1442(a)(1).[2] He argued that the subpoena should be quashed on three grounds. First, sovereign immunity barred enforcement of a grand jury subpoena issued to a federal employee for testimony regarding his federal employment. Second, Siminoe could not be compelled to testify in contravention of a directive issued by his agency pursuant to its *Touhy* regulations. Third, the grand jury's investigation into federal land management was in derogation of intergovernmental immunity and the Supremacy Clause.

On July 12, 1996, the federal district court issued a minute order quashing the subpoena and denying petitioner's motion to remand the case to state court. Pet. App. B.

The court of appeals affirmed. Pet. App. A. The court initially noted that the jurisdiction of the federal district court on removal pursuant to Section 1442(a)(1) was derivative of the state court's jurisdiction. *Id.* at A4 (citing *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922)). The court further explained that, in the absence of an applicable waiver of sovereign immunity, the state court lacked jurisdiction to determine whether USDA had correctly invoked its *Touhy* regulations, or to issue a bench warrant for the arrest of a federal employee based on such a determination. *Id.* at A5-A6. Accordingly, the court of appeals held that neither the state court nor the district court on removal had

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[2] The federal officer removal statute "ensure[s] a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981).

jurisdiction to enforce the subpoena. The court of appeals also pointed out that the "appropriate means" for seeking review of USDA's invocation of its *Touhy* regulations would be a suit filed in federal district court pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 702. Pet. App. A7 n.1.

ARGUMENT

The court of appeals' conclusion that neither the state court nor the federal district court on removal had jurisdiction over this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's proceeding in state court to enforce a state grand jury subpoena against Siminoe is barred by the *Touhy* doctrine and federal sovereign immunity.

1. In *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), this Court held that a subordinate federal agent could not be held in contempt for refusing to obey a subpoena when the Attorney General, acting pursuant to valid federal regulations governing the release of official documents, had ordered him to refuse to comply. *Id.* at 469. Similarly here, the Forest Service directed Siminoe not to testify pursuant to a USDA regulation prohibiting its employees from appearing in "a judicial or administrative proceeding unless authorized in accordance with this subpart." 7 C.F.R. 1.212. Thus, the *Touhy* doctrine bars any court—whether a state court or a federal court on removal—from enforcing a state court subpoena directing Siminoe to appear in contravention of his agency's directive. See, *e.g.*, *In re Boeh*, 25 F.3d 761, 764 (9th Cir. 1994), cert. denied, 513 U.S. 1109 (1995).

Moreover, because "the *Touhy* doctrine is jurisdictional," it "precludes a contempt action regardless of whether [the regulation] is ultimately determined to protect the requested testimony." *Swett* v. *Schenk*, 792 F.2d 1447, 1452 (9th Cir. 1986). As the court of appeals observed, if petitioner wished to challenge the merits of USDA's decision under its regulations, the proper forum for that challenge would have been in federal district court, in an action against the agency itself under the APA, 5 U.S.C. 702. Pet. App. A7 n.1.[3]

2. Petitioner's claim is independently barred by federal sovereign immunity. Courts have long held that a suit "against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to governmental privilege of immunity." *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 69 (4th Cir. 1989) (citing *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). If, as here, an officer's refusal to testify is at the behest of his agency superior based on the agency's validly promulgated *Touhy* regulations, then that refusal is within the scope of the officer's delegated authority. Absent a waiver of sovereign immunity, a state court (or a federal court on removal) does not have jurisdiction over a suit against a federal officer with regard to matters within the officer's scope of employment. Since the United States has nowhere consented to state subpoena enforcement actions

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[3] The federal courts have exclusive jurisdiction over such claims. See *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 71 (4th Cir. 1989) ("Congress has expressly limited [APA] review to the federal courts, and a state court's assertion of the power of judicial review over federal agencies directly contravenes 5 U.S.C. § 702.").

against its officers and employees, the courts of appeals have consistently held that sovereign immunity bars enforcement of subpoenas issued by state courts to federal employees. See, *e.g.*, *Edwards* v. *United States Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994); *Louisiana* v. *Sparks*, 978 F.2d 226, 234-235 & n.16 (5th Cir. 1992); *Boron Oil*, 873 F.2d at 70.

Petitioner relies (Pet. 10-11) on *Florida* v. *Cohen*, 887 F.2d 1451 (11th Cir. 1989), in which the Eleventh Circuit on removal addressed the merits of a federal agency's directive to certain employees to refuse to comply with a state court subpoena. However, the *Cohen* court did not consider whether sovereign immunity barred the court from reaching the merits, since "[n]either party challenge[d] the district court's determination that the refusal of the federal officials to provide the requested information should properly be assessed as an invocation of privilege to be evaluated by the federal courts." *Id.* at 1454.[4] Some courts have held that, once an agency consents to be sued, a court may consider whether an agency's refusal to produce information is justified by federal privilege law because, "[h]aving consented to suit, the United States should be held to have placed itself in the position of an ordinary litigant before the court, to whom the rules of civil procedure ordinarily apply." *Mosseller* v. *United States*, 158 F.2d 380, 382 (2d Cir. 1946). But no such theory of sovereign immu-

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[4] In another case cited by petitioner (Pet. 12), *Kansas* v. *Call*, 760 F. Supp. 190 (D. Kan. 1991), aff'd, 961 F.2d 220 (10th Cir. 1992) (Table), the district court similarly failed to address the issue of federal sovereign immunity before reaching the merits of whether federal employees could properly refuse to answer a state subpoena under the agency's *Touhy* regulations. *Id.* at 192.

nity waiver applies here, where the federal official was subpoenaed by a state court, and the agency invoked the sovereign immunity of the federal government. Moreover, it is well-established that, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974)). By the same token, because the *Cohen* court did not explicitly consider the scope of its jurisdiction, its decision does not give rise to a circuit conflict warranting resolution by this Court.[5]

Petitioner also claims that the district court should have considered the validity of USDA's *Touhy* regulations, since "[i]nvocation of sovereign immunity as a defense which prevents the contempt action requires valid regulations, for if the refusal is not authorized, the employee cannot be acting on behalf of the United States." Pet. 14-15 (citing *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*). That argument is without merit because "[t]he doctrine of

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[5] Petitioner also cites (Pet. 12) *Dent* v. *Packerland Packing Co.*, 144 F.R.D. 675, 679 (D. Neb. 1992), for the proposition that a federal district court on removal may evaluate the merits of an officer's refusal to comply with a state court subpoena. However, the *Dent* court's holding was erroneous because the cases upon which it relied, *Moore* v. *Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991), and *Davis Enterprises* v. *United States Environmental Protection Agency*, 877 F.2d 1181 (3d Cir. 1989), cert. denied, 493 U.S. 1070 (1990), both originated in federal court. The APA's waiver of sovereign immunity is applicable to actions originating in federal court. See 5 U.S.C. 702.

sovereign immunity precludes the state court—and the federal court which gained limited jurisdiction upon removal—from exercising jurisdiction to compel [a federal officer] to testify contrary to [agency] instructions, and also denies it the authority to review and set aside the [agency's] decision and the federal regulations under which it is made." *Boron Oil*, 873 F.2d at 70.

3. As noted above, the appropriate method for challenging a federal agency's *Touhy* regulations is to bring an APA action against the agency itself in federal court. Petitioner contends for the first time before this Court (Pet. 9) that the district court had jurisdiction to "convert the contempt action to an action under the [APA]," and should have done so of its own accord. Petitioner relies (Pet. 11) on *Edwards* v. *United States Department of Justice*, *supra*, in which a district court converted a state subpoena enforcement action, which had been removed to federal court pursuant to 28 U.S.C. 1442, into an APA challenge. However, in that case, "[t]he parties and the district court * * * agreed to recast the federal proceeding as an APA claim." 43 F.3d at 314. There was no such agreement here. Moreover, petitioner did not argue to the court of appeals that its suit should have been "converted" into an APA challenge, nor did it cite *Edwards* in its brief.[6]

At the very least, it was not an abuse of discretion for the district court to decline to convert the action from a simple contempt proceeding against a federal officer into an APA action against the agency itself.

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[6] The government did cite *Edwards* twice in its court of appeals brief, but for completely unrelated propositions. Gov't C.A. Br. 10, 11.

Even assuming that the federal district court would have jurisdiction to do so on removal from state court, to convert a contempt proceeding into an APA action would stretch the liberal pleading rules beyond their logical scope, and might raise additional problems of personal jurisdiction and venue. It thus is not surprising that the vast majority of courts confronted with this situation have indicated that the proper course for litigants in petitioner's situation is to bring a *separate* APA challenge in federal court. See, *e.g.*, *Swett*, 792 F.2d at 1452 n.2; *Houston Business Journal, Inc.* v. *Office of Comptroller of Currency*, 86 F.3d 1208, 1212 n.4 (D.C. Cir. 1996). See also *In re Boeh*, 25 F.3d at 764 ("We understand * * * that it may be more cumbersome to challenge an assertion of privilege by an APA suit or mandamus action, but *Touhy*, *Sackett* and *Swett* preclude litigants and courts from first pursuing the option of contempt proceedings against subordinate officials who have been denied permission to respond to a subpoena.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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